

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

INDEX.

	Page.
STATEMENT OF CASE.....	1
STATUTE.....	1-3
INDICTMENT.....	3-6
QUESTION INVOLVED.....	7-9
ASSIGNMENTS OF ERROR.....	10
ARGUMENT.....	10-25
(a) Argument in Case No. 480, to the effect that external stand- ard provided in main enacting part of section 2 of Harrison Narcotic Act, adopted in this brief.....	10
(b) Mere fact that provisions as to physicians are exceptions from main enacting part of section not sufficient to show that intent immaterial, but exact language used in exceptions must be analyzed.....	11
(c) The determining words are "patient," and "in the course of his professional practice only," and the question is whether these words permit of the use by all registered physicians of the "ambulatory treatment".....	11-13
(d) Harrison Narcotic Act has two purposes, first, to collect rev- enue, second, to prevent the use of the drugs except as a medicine.....	13-25
(1) To effect the revenue purpose, act should be construed as prohibiting furnishing the drugs to addicts to be used or disposed of without supervision or restriction. Decisions of Judge Hand and of this court.....	13-20
(2) Considering the act as a measure to prevent drug addic- tion, it is a misuse of words to say that the "ambula- tory treatment" is the treatment of a "patient" to ef- fect a cure.....	20-25

CITATIONS.

CASES.

<i>Barbot v. United States</i> , 273 Fed. 919.....	24
<i>Hoyt v. United States</i> , 273 Fed. 792.....	22
<i>Jin Fuey Moy v. United States</i> , 254 U. S. 189.....	17, 18
<i>Johnson v. United States</i> , 228 U. S. 457.....	18
<i>United States v. Balint and Randazzo</i> , No. 480, Oct. Term, 1921....	10
<i>United States v. Doremus</i> , 249 U. S. 86.....	9, 13, 16, 18, 25
<i>United States v. Rosenberg</i> , 251 Fed. 963.....	13
<i>Webb v. United States</i> , 249 U. S. 96.....	9, 17, 18, 20, 21, 25

STATUTES.

Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.....	1
Harrison Narcotic Act of December 17, 1914, c. 1, 38 Stat. 786.....	1, 7, 8, 9, 10, 11, 12, 13, 16, 17, 20, 21, 23, 25

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA,PLAIN-	} No. 582.
tiff in Error,	
v.	
MORRIS BEHRMAN.	

*ON ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.*

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF CASE.

The defendant in error (hereinafter called the defendant) was indicted in the Southern District of New York for a violation of the Harrison Narcotic Act of December 17, 1914, c. 1, 38 Stat. 786. (R. 2, 3.) The indictment was demurred to, the demurrer was sustained (R. 5, 6), and this writ of error was sued out under the authority of the Criminal Appeals act of March 2, 1907, c. 2564, 34 Stat. 1246.

THE STATUTE.

It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such

article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, territorial, district, municipal, and insular officials named in section five of this act. Every person who shall give an order as herein provided to any other person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address

of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.

(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act: *Provided, however,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further,* That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.

THE INDICTMENT.

As the case turns entirely upon the exact language of the indictment which specifies the alleged offense in detail, so that every portion of it may be material to the present discussion, it is thought best to give it in full:

The grand jurors of the United States of America duly empaneled and sworn in the District Court of the United States for the

Southern District of New York, and inquiring for that district, upon their oath, present:

That heretofore, to wit, on June 10, 1919, in the borough of Manhattan, city, county, State, and Southern District of New York, and within the jurisdiction of this court, Morris Behrman, hereinafter called the defendant, did unlawfully sell, barter, and give to Willie King, a compound, manufacture, and derivative of opium, to wit, 150 grains of heroin and 360 grains of morphine, and a compound, manufacture, and derivative of coca leaves, to wit 210 grains of cocaine, not in pursuance of any written order of the said Willie King on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that is to say, that at the time and place aforesaid the defendant, being a physician duly licensed to practice as such and duly registered under the act of December 17, 1914, as amended by the act of February 24, 1919, did issue and give to the said Willie King three written orders in the form of prescriptions signed by him and which said orders called for the delivery to said Willie King of 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, respectively, the said heroin and morphine being derivatives of opium and the said cocaine being a derivative of coca leaves, as defendant then and there well knew; that at the time and place aforesaid the defendant, in issuing the said three orders in the form of prescriptions and giving same to the said Willie King, intended and purposed that the said Willie King would obtain the said drugs from a druggist upon said

orders; that thereafter and at the place and on the date aforesaid the said Willie King did obtain upon said orders, so issued and given to him by the defendant, from one Samuel Siegel, a duly licensed pharmacist registered under the act of December 17, 1914, as amended by the act of February 24, 1919, 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine, which said drugs were obtained from the said Samuel Siegel pursuant to the said three orders in the form of prescriptions so issued by the defendant and not in pursuance of any written order on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States; that on said date the said Willie King was a person addicted to the habitual use of morphine, heroin, and cocaine and known by the defendant to be so addicted; that on said date the said Willie King did not require the administration of either morphine, heroin, or cocaine by reason of any disease or condition other than such addiction, and the defendant did not dispense said drugs or any of them to said Willie King for the purpose of treating any disease or condition other than such addiction; that none of the said drugs so dispensed by the defendant was administered or intended by the defendant to be administered to the said Willie King by the defendant or by any nurse or person, other than the said Willie King, acting under the direction of the defendant, nor were any of said drugs consumed or intended by the defendant to be consumed by the said Willie King in the presence of the de-

fendant, but all of said drugs were put in the physical possession and control of the said Willie King with the intention on the part of the defendant that said Willie King would use same by self-administration in divided doses over a period of several days, the amount of each of said drugs dispensed as aforesaid being more than sufficient or necessary to satisfy the craving of the said Willie King therefor if consumed by him all at one time; that said Willie King was not, at the time and place aforesaid, nor was he intended by the defendant to be, during the period in which the drugs dispensed as aforesaid were to be used by him, under the observation and physical control of the defendant or of any nurse or other person acting under the direction of the defendant, nor was said Willie King in any way restrained or prevented from disposing of said drugs in any manner he might see fit; that said drugs dispensed by the defendant to the said Willie King as aforesaid were not mixed with any other substance, medicinal or otherwise, but were in the form in which said drugs are usually consumed by persons addicted to the habitual use thereof to satisfy their craving therefor and were adapted for such consumption; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided.

QUESTION INVOLVED.

The question raised by the indictment and the demurrer thereto, and decided by the court adversely to the United States.

The purpose of this indictment and of the present writ of error is to raise for the determination of this court the following question, viz., whether the so-called "ambulatory treatment" of drug addicts by a physician is or is not, *as a matter of law*, prohibited by section 2 of the Harrison Narcotic Act of December 17, 1914, c. 1. By the term "ambulatory treatment" is meant the treatment by a physician of a drug addict, for the alleged cure of his drug addiction, by giving to him a prescription for the amount of the drug which the physician, in good faith, believes to be necessary in the condition of the drug addict at the time the prescription is given, for his use as one dose or over a period of time, and allowing the addict to take the prescription and to use it in any manner he may see fit, without any supervision or control of the doctor over him in any manner or form whatsoever.

Having in mind the raising of this question for the determination of this court, the indictment alleged in effect that the defendant, being a duly licensed and registered physician, gave a prescription for a very large amount of heroin, morphine and cocaine to Willie King; that Willie King was a drug addict to the defendant's knowledge, and was suffering from no other disease than drug addiction; that the de-

fendant gave him this prescription for heroin, morphine and cocaine not in order to cure any disease, other than drug addiction; that he allowed Willie King to leave his office and get the prescription filled at a drug store (which Willie King did) without exercising, or intending to exercise, any supervision or control whatsoever over Willie King either by himself or by any agent of his; and that it was his intention that Willie King should administer these drugs to himself, without supervision or control of the defendant, in divided doses over a period of several days, the amount of drugs covered by the prescription being (as any one would immediately perceive) more than Willie King could possibly use himself at that time.

The theory of the indictment is that this action upon the part of the defendant was, not a question for the jury, either on the defendant's intent, or as to what constituted the legitimate practice of his profession, but a violation of the Harrison Narcotic Act *as a matter of law*, since such a method of treatment was not the treatment of a "patient" "in the course of his professional practice only," within the meaning of these words in section 2 of the Harrison Narcotic Act.

In order to advise this court of the necessity which induced the Government to raise this question by the present indictment, the following is quoted from an actual charge to the jury by a Federal court in the southern district of New York, with the statement

that this charge fairly represents the attitude of the Federal judges in the interpretation of the statute:

That it makes no difference whether the treatment of his patients by Dr. Lasse was helpful or harmful; whether his treatment benefited his patients or not; whether his methods were approved by the medical profession or not; whether the treatment he prescribed was correct treatment or incorrect treatment; and whether it was old or new; if Dr. Lasse did what he did honestly, believing that his treatment was good and would effect a cure, or help to do so, or help to break the addiction, he has violated no law and should be acquitted.

In ruling upon the demurrer Judge Sheppard, of the Northern District of Florida, who was sitting at the time in New York, expressed the opinion that the so-called "ambulatory treatment" was a perversion of the spirit of the Harrison Law and contrary to its reason, and that the validity of the indictment was in effect shown by the decisions of this court in the Webb and Doremus cases; but that, owing to the rulings to the contrary in the southern district of New York, he would sustain the demurrer, upon the ground, of course, that section 2 of the Harrison Narcotic Act, when properly construed, did not make the acts of the defendant, as set out in the indictment, a violation of the statute as a matter of law. (R. 5, 6.)

ASSIGNMENTS OF ERROR.

There are five assignments of error (R. 7, 8), but the main point is, as stated above, that the district court erred in construing the statute to the effect that the "ambulatory treatment" of drug addicts was not, in and of itself, as a matter of law, violative of the Harrison Narcotic Act.

ARGUMENT.

(a) It has already been argued in case No. 480, *United States v. Balint and Randazzo*, that the main enacting part of the second section, which forbids generally the sale or distribution of the drugs except upon an order form, contemplates merely an external standard and does not require either guilty knowledge or guilty intent upon the part of the defendant. The reasoning advanced and the authorities cited in the brief in No. 480 are referred to and adopted in this brief. The argument in case No. 480, if adopted by this court, has a tendency to show that the legislature did not intend, in any portion of the act (unless where expressly so provided), a subjective standard, nor to make a violation of the act by anyone depend upon the actor's intent or knowledge. That is to say, if the argument in case No. 480 be sound, an exception must be made from it in favor of physicians to sustain the subjective standard which the court below applied in the case at bar and which has been applied in other cases in the Federal courts.

(b) It will be observed, of course, that the provisions in the Harrison Narcotic Act relating to physicians and druggists are exceptions from the main enacting portion of the statute. Of course, it does not follow that, even though they are exceptions to a provision which requires no knowledge or intent, they themselves should be construed in the same manner; for it may be that Congress inserted the exceptions for the very purpose of excusing from liability physicians and druggists who had no knowledge of the facts essential to constitute the offense nor any intent to violate the law. It is necessary, therefore, to examine carefully the language of these exceptions in the light of the decisions of the Federal courts in order to determine therefrom whether or not the "ambulatory treatment" is within their terms.

(c) It will be observed that the first exception deals with the physician and the second with the druggist. The first excepts from the operation of the section the dispensing or distribution of the drugs by a physician "to a patient" and only, even to such a person, "in the course of his professional practice." The second excepts from the operation of the section the sale of the drug by the druggist pursuant to a written prescription issued by a physician, but (it is submitted) here also the prescription referred to must, in the nature of things, be a prescription "to a patient" and, even in that case, "in the course of his professional practice only." The vital words, therefore, in the construction of the

statute as respects the indictment in the case at bar are the words "patient" and the words "in the course of his professional practice only." The admitted facts of the case at bar, as alleged in the indictment and admitted by the demurrer, are that the defendant gave a prescription to a man whom he knew to be a drug addict, and suffering from no disease whatsoever except drug addiction, for drugs which the drug addict was to administer to himself when and how he chose, without any supervision or control whatsoever upon the part of the defendant or any agent of his. The question, therefore, resolves itself to this, viz, whether such action upon the part of the defendant can be called a dispensing or prescription of drugs to a patient in the course of his professional practice only, within the meaning of the Harrison Narcotic Act. In order that the matter may be made perfectly clear, it should be again insisted that, according to the indictment, the so-called "patient" in this case was suffering from no disease whatsoever except drug addiction. It must be admitted, for the purpose of the case at bar, that drug addiction is a disease, and that the defendant intended by his method of treatment to cure the same, and honestly believed that he could cure the disease by this method. Nevertheless, it is a well known fact, of which this court has taken notice, that drug addicts as a class are persons weakened materially in their sense of moral responsibility and in their power of will, and this court also knows, as a matter of common knowl-

edge, that, in any community where drugs are prescribed, there will be a large number of physicians to whom any construction of section 2 of the Harrison Narcotic Act will be applicable. The question, therefore, is whether every physician licensed and registered under the Harrison Narcotic Act, is at liberty, if he honestly believes such a course to be proper, to furnish to persons of the character of drug addicts the means to obtain the drugs without any supervision upon the part of the various doctors involved of the manner or time of taking the drugs or whether, indeed, the drugs are ever taken by the addict at all.

(d) As stated in the brief in case No. 480, the Harrison Narcotic Act had two purposes, viz, first, the collection of revenue by the Government, and, second, to prevent the use of the drugs in any other way than as a medicine. It will be helpful to take up the construction of the act in both of these aspects.

(1) In so far as the revenue feature of the act is concerned, the attention of this court is particularly called to the decision in *United States v. Rosenberg*, 251 Fed. 963, wherein, before the decision of this court in *United States v. Doremus*, 249 U. S. 86, Judge Learned Hand, in the southern district of New York, held the act constitutional as a revenue measure. In our judgment, the reasoning of Judge Hand is precisely the reasoning adopted by this court in the Doremus case, but, since Judge Hand analyzes the nature of the act from a revenue point of view

more at length than this court thought proper to do, his language is quoted:

The tax being an excise, it was an essential part of its purpose that there should be no sales by unregistered persons. Yet the final sale must be to an unregistered person, the consumer. There was, therefore, a genuine difficulty in insuring that the sale to any unregistered person should be to a consumer, and that he should not in turn resell. Physicians were naturally the class who would dispense a large part of the drug to consumers, whether used as a medicine or to gratify an appetite. It was a reasonable contrivance to limit the final sales to physicians upon the theory that they were the most reliable of all available classes of distributors to insure its limitation to genuine consumers. I can not say, therefore, that it was not a fair piece of administrative machinery to empower this class exclusively to distribute the drug.

The section does, however, go farther than this, because it forbids physicians selling opium except as a medicine, and it must be confessed that it may not be easy to see how this limitation can proceed from any other consideration than a policy of suppression. Nevertheless, it still seems to me to have enough relation to reality to save even this feature of the plan. We are to suppose that physicians are intrusted with the final distribution of opium as the class of sellers most likely to secure a distribution to consumers only. But the only two classes of consumers

are the sick and those who are addicted to it as the gratification of a morbid craving. Hence the effect of the limitation upon physicians' right to distribute is to cut off the second class of consumers. Has that prohibition any genuine relation to a statute aimed to require a license tax from all those who sell opium? On the whole, I think it can not be said not to have such a relation. Addicts to the use of opium are as a rule persons of greatly impaired will and of little sense of social obligation, and they usually demand relatively large quantities at frequent intervals. If they are given access to unlimited quantities, there is a genuine possibility that they might find it profitable to sell so much as their immediate needs did not require. As a class they would be most unlikely to observe any law which imposed upon them an excise as a condition of resale. Therefore, to shut them off from all right to the drug, even assuming that Congress must regard indifferently their demand and that of the sick, does not seem to me inevitably an irrelevant administrative measure. It is quite true that incidentally it shuts off the actual consumption of opium by addicts; but I do not understand that it is a good cause of complaint against an excise that in its incidents it may suppress some consumption. All that is necessary is that the limitation be appropriate to suppress sales which, if they did occur, would evade the law. If that be true, the incidental other results do not invalidate it.

Attention is expressly called to the statements of Judge Hand to the effect that the object of the act, looked at as a revenue measure, was to exclude addicts wholly from the class of consumers, for the reason that drugs placed in their hands without supervision would necessarily reach the channels of commerce and be sold and distributed without payment of any tax. In other words, Judge Hand's view was that if drug addicts were to be treated at all they must be treated as "patients"; that the Harrison Act meant to limit the term "patient" to those persons who were under the supervision of the doctor, to whom the drug was administered by him as a cure for a disease, whether that disease were drug addiction or something else; and that the term "patient" did not include a drug addict to whom the drug was furnished to be used at and in his own discretion. It is submitted that this view of Judge Hand's was in effect adopted by this court in the case of *United States v. Doremus*, where it was said (249 U. S. 94, 95):

The provisions of § 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to

collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

Following out this same line of thought, this court held in *Webb v. United States*, 249 U. S. 96, 99, 100, that an order issued by a doctor to an addict, not to cure him of his habit but merely to keep him comfortable by maintaining his customary use, could not be called a "prescription" within the meaning of exception (b) of section 2 of the Harrison Narcotic Act. This ruling was approved and again applied in the case of *Jin Fuey Moy v. United States*, 254 U. S. 189, 194, where the court said:

Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's

professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it. *Webb v. United States*, 249 U. S. 96.

It is true that in the *Doremus*, *Webb*, and *Jin Fuey Moy* cases it was assumed that the physician in prescribing the drugs in question did not honestly intend to effect a cure of the drug addiction and did not honestly believe that his method would effect a cure, but was merely administering the drug to satisfy the cravings of the addict; and that this court is asked in the case at bar to go beyond these decisions, and to hold that, irrespective of the physician's intent or belief, the act is violated where the drugs are placed by him in the sole control and subject to the unrestricted disposal of a drug addict. Yet, as said by Mr. Justice Holmes in the somewhat similar case of *Johnson v. United States*, 228 U. S. 457, 458: "Courts proceed step by step." No question in regard to the intent or belief of the physician was raised or was material in the cases under the Harrison Act referred to above or in the cases which are referred to later; and it was enough for the court to meet the question as then raised, without attempting to consider or discuss questions which were not before it. The principles, however, laid down in those decisions, in so far as they relate

to the revenue feature of the Act, do not seem to prevent, they rather seem to encourage, the conclusion that, irrespective of the intent or knowledge of the doctor, the transfer of drugs to an addict without any supervision whatsoever over him and his future course of conduct would not be, as a matter of law, the prescription of the drugs to a patient in the legitimate practice of a physician's profession. In other words, assuming the evil to be (as it must be assumed after the decisions of this court that it is) the loss of revenue to the United States by reason of the coming of the drugs into the hands of addicts who would dispose of the drugs to others, thereby causing them to enter the channels of commerce in such a manner as to deprive the Government of its tax, it is evident that this evil is just as imminent, in fact inevitable, if the drug be given to the addict without supervision, whether the physician believe that he is affecting a cure, or intend to effect a cure, or not. His belief or intention can not in any way whatsoever prevent the addict from acting in the usual manner in which addicts act, and consequently disposing of the drug to other persons, such as pedlars, and thus causing its sale and distribution without the payment of any tax. The case in this aspect of it clearly falls within the class of general revenue legislation, where the sole test is whether the effect of the actions of the defendant is to deprive the Government of its revenue, and where, consequently, the intent, knowledge, or belief of the defendant is wholly immaterial on the question of his liability,

because wholly immaterial as to the effect produced by his actions.

(2) In regard to the aspect of the Harrison Narcotic Act, viz, as a measure aimed to prevent drug addiction or the acquiring of the habit, the case made by the indictment at bar must be looked at in the same spirit in which this court looked at the third certified question in the Webb case. In the Webb case the same argument on principle could have been and was made to the effect that, if the physician wrote out a paper in the form of a prescription to a person who had come to him in the guise of a patient for a drug which is used in medicine, necessarily that paper must be a prescription. This court, however, refused to yield to the magic of mere words. It used its common sense, looked below the surface, and determined that in reality such a paper was not a prescription at all, differing in no respect from an order given by a person upon a retailer for the supplying of the drugs. If the question of the true meaning of the word "patient," and the words "in the course of his professional practice only" in section 2 of the Harrison Narcotic Act be looked at in this same spirit, in the light of common sense, it would seem that the same conclusion must be reached, viz, that a paper given to an addict calling for drugs to be disposed of by the addict himself in any manner he sees fit, and without any supervision upon the part of the physician, can not be called a "prescription" to a "patient" "in the course of his professional practice only."

As a matter of common sense, no drug addict can possibly be cured by any such method as this, and the whole method of treatment is a mere pretense (however honest the doctor may be in his belief and intentions) by which the addict obtains a store of drugs to suit his cravings and to dispose of for money if he so desires. As was said above, the case must be looked at in view of the fact that any construction placed upon section 2 of the act will necessarily apply to all the doctors who are licensed and registered under the Harrison Narcotic Act. If the "ambulatory treatment" be permissible to one, it is permissible to all. The result is that a drug addict may visit as many doctors as he please, may obtain from each of them the amount of the drug deemed necessary for him in his then condition, and may dispose of the drug so obtained in any manner he sees fit. To call such a practice as that a treatment of a patient in order to cure a disease is merely yielding to the magic of words, a thing this court refused to do in the Webb case. On the surface a drug addict, taking the ambulatory treatment, might be called a "patient;" and, on the surface, such a treatment might be said to be according to the professional practice of the physician, since it is alleged that it is given with the intent to cure the addiction. When, however, the matter is looked at below the surface, it can not but be perceived that the whole process of treating addicts by the "ambulatory treatment" is a mere subterfuge to conceal the real facts of the situation, viz, the supplying of

the addict with all the drug that he desires. Unless the addict can cure himself (a thing which everyone knows is impossible), no cure can be effected by any such method as this; and the only result is to transfer the distribution of the drugs from regular licensed dealers in them to physicians.

If this court had before it the very similar cases of alcohol or nicotine addiction, it surely could feel no doubt upon the subject. Let it be assumed that a physician purports to treat a drunkard by giving him a prescription for as much whiskey as he thinks he needs at that moment, to be obtained by the drunkard from a drug store and drunk at his own convenience or disposed of in any other way he sees fit. And let it be assumed that this may be done by a large number of physicians. Can anybody possibly say that such a treatment is a treatment of a patient in the ordinary course of the professional practice only? The very same thing might be said of the treatment of a person suffering from the addiction of tobacco. It is a misuse of terms to speak of the indiscriminate furnishing of whiskey or tobacco to an addict to be used by him at his discretion as the treatment of a patient in the course of professional practice. If it be a misuse of terms as respects whiskey and tobacco, it is equally a misuse of terms when applied to drug addiction.

Two recent cases in the Courts of Appeal may be referred to as significant of the validity of the above argument. In *Hoyt v. United States*, 273 Fed. 792, 796, 797, 698, the Court of Appeals for the Second

Circuit, in the course of affirming a judgment of conviction against a physician for violation of the Harrison Narcotic Act in prescribing to drug addicts, said:

The defendant admitted that an addict could not be taken off the drug by the sole method of the drug being given to him to administer to himself; that is, by what is known as the ambulatory method. He admitted that, to take him off the drug, it was essential that the addicts should be put under absolute control. Nevertheless he was for long periods of time and for self-administration furnishing the drug to large numbers of persons over whom he had no control. There is abundant evidence in the record from which a jury might conclude that he was engaged in carrying on a mercantile business in selling narcotics, and was dispensing the drugs wholly outside of what under any theory of medicine could have been denominated professional practice only. * * *

The Government, however, called to the stand as an expert witness a member of the staff of Bellevue Hospital in New York City, who had made a study of narcotic drug addiction, and who had treated thousands of such cases, and who testified fully on the subject. He testified that drug addiction can not be cured, except by putting a person into an institution where he can not get the drug; that that course is absolutely necessary. "Drug addicts themselves will tell you that, as long as they are out where they can get the drug, walking around, why, they will get it." His

testimony was that in institutions heroin is never given, and that in cases where the gradual withdrawal method is pursued a patient is given as a rule one or two grains of morphine for a day, and that the drug is gradually withdrawn in the course of a week or ten days, until it is reduced to nothing. Then before he is permitted to leave the institution he is kept confined for six weeks or two months and given treatment to build up his general health. There are other methods, such as the rapid withdrawal method and the sudden withdrawal method. He testified that all the various methods of treating drug addiction involved taking the patient off the drug. A hypothetical question was put to the witness, justified by the evidence in the case, and he was asked whether in his opinion the method pursued by the physician could be regarded as "a method of promoting the cure of a drug addict," and he replied that it could not.

In *Barbot v. United States*, 273 Fed. 919, 921, the Court of Appeals of the Fourth Circuit, in affirming the judgment of conviction in a similar case, said:

A careful review of the decisions as they exist at the present time make clear the fact that, when a physician is charged with unlawfully selling or prescribing drugs under the Harrison Act, the case turns largely upon his good faith in prescribing drugs to his regular patients, for maladies requiring the administration of the drug, or whether he prescribed for persons seeking his professional aid merely

to procure the drug. In the latter case the physician might, perhaps, in a single instance afford temporary relief for one whose condition demanded immediate treatment. To go further than this would enable every doctor to do just what the defendant did here—furnish the drug to addicts, or afford opportunity to them to procure all the narcotics they desired; as, unrestrained, they would go from one physician to another, and quickly destroy the whole purpose of the act in question.

It is true, as indicated above with reference to the decisions of this court in the Doremus and Webb cases, that in these two decisions of the Courts of Appeal it was assumed that, if the physician prescribed the drugs in an honest effort to cure the disease of drug addiction, he was not guilty of an offense; but (to repeat) this was because the courts did not have to go any further in the cases then before them. The reasonable conclusion to be drawn from their own reasoning is that the “ambulatory treatment” is in and of itself, as a matter of law, a violation of the Harrison Narcotic Act, for the reason that it is not the treatment of a “patient” “in the course of professional practice.”

The judgment of the court below should be reversed.

JAMES M. BECK,

Solicitor General.

WILLIAM C. HERRON,

Attorney.

Office Supreme Court

FILIED

MAR 4 1922

WM. R. STANS

CL

No. 582

**In the
Supreme Court of the United States**

OCTOBER TERM, 1921.

**THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,**

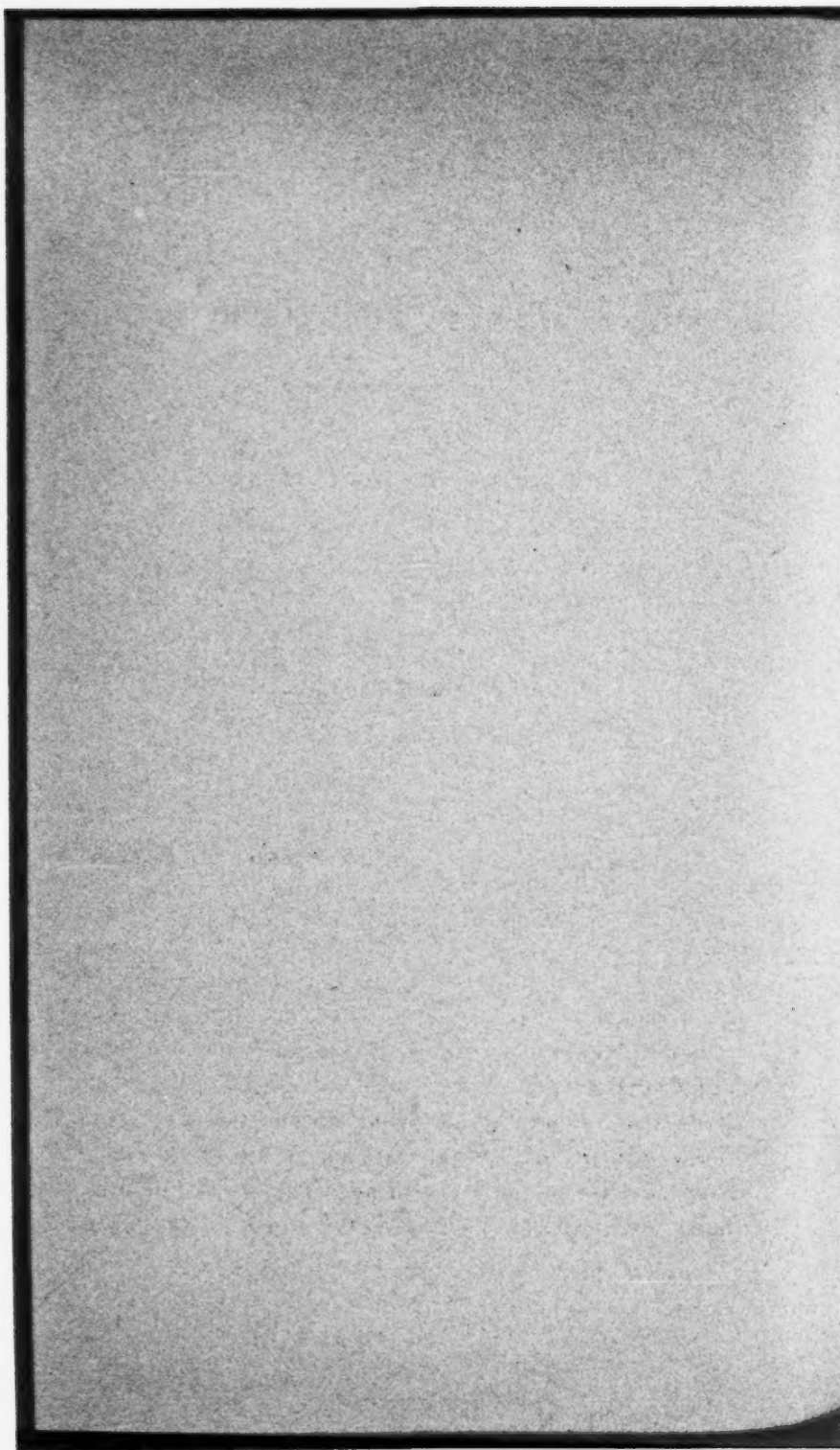
v.

MORRIS BEHRMAN, DEFENDANT IN ERROR.

***ON ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.***

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

B. H. TYRAEL, PRINTER, 206-S FULTON STREET, NEW YORK.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

THE UNITED STATES OF AMERICA,
Plaintiff in error,

v.

MORRIS BEHRMAN,
Defendant in error.

No. 582.

ON ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

The case and question involved herein are correctly stated in the government's brief, wherein the relevant portion of the statute and the entire indictment are placed before the court. But throughout the brief are excesses of statement which if accepted at face value might mislead the court, a result, which however we do not fear. Therefore, we shall discuss the very point of law without any special criticism of the Government Brief, because of undue coloring. That brief correctly states the question involved in the words; "The ques-

tion raised by the indictment and the demurrer thereto, and decided by the court adversely to the United States".

It is important in such a case that the discussion be not allowed to drift into needless distinctions; nor is clarity attained by the introduction of confusing terms not found in the statute or indictment. For instance, in the brief that we are answering, considerable space is devoted to what is designated as "ambulatory treatment", whereas the real question is whether the acts charged constitute an offence within the language actually used in the Statute.

It requires a strained, indeed a non-permissible, construction to bring the administration, direct or through prescriptions of the narcotics specified, within the terms or meaning of the act, even if exceptions "(a)" and "(b)" had not been inserted. To see this we only have to note the first sentence of said statute as set forth by the government and call to mind the uniform, almost invariable, methods of practice by the medical profession. The first sentence is in these words: "It shall be unlawful for any person to sell, barter, exchange or given away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue". Now a physician in treating a patient and prescribing for him does not either sell, barter, exchange or give away the medicine or medicines, which he prescribes. The prescription embodies professional advice for which the patient pays. He does not buy the prescription, but pays for the advice. The order must not only have to be issued in blank by

the Commissioner of Internal Revenue but it must be the order "of the person to whom such article is sold, bartered, exchanged or given." Now a physician neither buys, barterers for nor takes in exchange, or as a gift the medicines which he advises the patient to take in the giving of a prescription, which, as is common knowledge, seldom if ever has the form of an order. And this statute differentiates amply for our present purpose prescriptions from the commercial orders meant in the language above quoted. In exception (b), prescriptions are placed in a distinct category from such orders. That the "written order" required to be presented by an ordinary purchaser is in a category other than the prescription is further shown by the requirement of different modes of authentication. The written order must be on a written blank furnished by the Commissioner of Internal Revenue. This order is that of the person to whom the sale etc. is made. But in the exception "(b)" the written prescription which the purchaser uses and to which the statute does not apply, "shall be dated as of the day on which it is signed by the physician who shall have issued the same".

The indictment sufficiently alleges compliance by the defendant with all the prescribed formalities for prescriptions. But, seemingly, through abundance of caution, Congress has inserted in the act exceptions (a) and (b). The statute says: "Nothing contained in this section shall apply: (a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only." The proviso which completes that exception is

not relevant nor is any portion of exception "(b)" relevant, except that the latter furnishes conclusive evidence that Congress had in mind the common or uniform method by which the exempted classes practice their professions, namely by delivering written prescriptions. In other words, Congress recognized that civilization embraces a profession of numerous and, for a most part, highly esteemed membership, upon whom afflicted, diseased, crippled and dying humanity leans in pain and anguish. And, now, with no justifying words in the statute, plaintiff would interpolate a meaning to exclude those constituting a large class designated as "addicts", where the purpose is merely relief from pain and not to effect a cure. But even if we conceded the correctness of that extreme view it would not save this indictment, as is more fully shown hereinafter.

The statute contains not a word of limitation upon words "professional practice only," nor does it use the term, "addict" or any reference whatever to any class of patients or diseases, and the government admits that addiction is a disease. We freely admit that the statute may be violated surreptitiously, and that an indictment could be framed which would hold good against demurrer however apparently regular the procedure of the physician. Of course a prescription could be resorted to by a regular licensed physician as a mere subterfuge for effecting a sale. But such indictment would have to differ considerable from this indictment. Not only is there a total absence of allegation of bad faith, unlawful intent and irregularity, but language is used clearly warranting a contrary presumption in each and all of these respects. We find it alleged that the defendant

was "duly licensed to practice as such physician, and duly registered". And while the papers delivered to the said Willie King are termed orders, it is alleged that they were "in the form of prescriptions signed by him" (defendant). Further along it is alleged that the "said drugs were obtained from said Samuel Siegel pursuant to the said three orders, in the form of prescriptions." In other words Willie King diseased with "addiction" procured from the defendant, a physician duly licensed, etc., three prescriptions for specified quantities of the narcotics mentioned in the statute, and these prescriptions were filled by Samuel Siegel a duly registered pharmacist, which brings the case within exception "(a)" within the purview of the preceding portion of the section in the light of exception "(b)".

There are other allegations tending to exclude the inference of a fraudulent intent or any evasive conduct, such as effecting a sale violative of the revenue phase of the act. It is alleged that "all of said drugs were put in the physical possession and control of said Willie King with the intention on the part of the defendant that said Willie King would use same by self-administration in divided doses over a period of several days the amount of each of said drugs dispensed as aforesaid being more than sufficient or necessary to satisfy the craving of the said Willie King therefor if consumed by him all at one time." In other words, he intended that said Willie King should use same by self-administration in divided doses "over a period of several days." In the government's brief, the amount of drugs is designated as "large", but the allegation that the drugs were to be self-administered in divided doses "over a

period of several days" seems to negative, or at any rate modify any such inference. The court might infer as a matter of common knowledge that the quantity would be excessive if a limited number of doses were specified, but in this case, owing to the indefiniteness of "several days" we have no data to justify an inference that the quantity was large.

The Government's Contention Fails on Authorities.

The Government says in its brief (p. 10: "There are five assignments of errors (R., 7, 8), but the main point is, as stated above, that the district court error in construing the statute to the effect that the "ambulatory treatment" of drug addicts was not, in and of itself as matter of law, violative of the Harrison Narcotic Act." In other words, the government contends that the case alleged in the indictment is not one within the exceptions, while our contention is that, it is within the exceptions and not within the prohibitions, upon reasonable construction. In substance, the same question is raised by our objection based on the insufficiency of the indictment (R. 5) in these words:

That the facts alleged in said indictment do not constitute a crime, because they are consistent with defendant's innocence and an honest and sincere purpose and intention on his part to cure Willie King of his addiction to the use of the drugs dispensed, or to permanently better his physical condition due to such addiction.

All the cases decided under the act and cited by the Government preceding its discussion of the Hoyt and Barbot cases, are so disposed of by its counsel, after

citing and analyzing them, that we are relieved of the onus of their discussion, and we concur in the following quotation from said brief (P. 18):

“It is true that in the Doremus, Webb and Jin Fuey Moy cases it was assumed that the physician in prescribing the drugs in question did not honestly intend to effect a cure of the drug addiction and did not honestly believe that his method would effect a cure, but was merely administering the drug to satisfy the cravings of the addict; and that this court is asked in the case at bar to go beyond these decisions and to hold that irrespective of the physicians intent or belief, the act is violated where the drugs are placed by him in the sole control and subject to the unrestricted disposal of the drug addict. Yet, as was said by Mr. Justice Holmes in the somewhat similar case of *Johnson vs. United States*, 228 U. S. 457, 456, ‘Courts proceed step by step.’ No question in regard to the intent or belief of the physician was raised or was material in the cases under the Harrison Act referred to above, or in the cases which are referred to later; and it was enough for the court to meet the questions then raised, without attempting to consider or discuss the questions which were not before it.”

Whatever else may be said of the language just quoted it conveys unmistakeably the information that an extension of the vindictory provisions of the Act to a new class of cases is sought; also that the decisions so far rendered do not support the desired extension and that a precedent to accomplish it is now sought.

Though, as presently shown, we are not required to go so far, yet for humane reasons, we urge that any con-

struction which would forbid and penalize the giving of a prescription to afford temporary relief, even though a cure was not in immediate contemplation, would be a harsh construction not warranted by any language in the statute.

In the two other cases cited by the Government, cited to support its contention, we find its contention is unsupported. We here renew our previous concession that there may be an indictable and punishable violation of the statute under color of practicing medicine and in the use of prescriptions. But we insist that while the cases so cited go to the extreme limit of culpability in such cases, they do not go far enough to save the indictment in this case. In *Hoyt vs. United States*, 273 U. S. 792, (at page 797) we find, not quoted in plaintiff's briefs but going further in support of its contention than the quotation made, the following, and yet falling short: "It may be true that a physician's method of treatment of drug addiction is a question to be determined by the physician himself, and not the jury; but it can only be true so long as the physician is pursuing his method in his honest endeavor to effect a cure. If that is not his purpose, and he is dispensing the drug to keep the addict comfortable he is violating the law."

Now in this indictment there is not a word to indicate that the defendant gave the prescription merely that the addict might make himself comfortable or that negatives the presumption that it was given with the intention of effecting a cure. The allegation which approaches nearest the hypothetical case of culpability indicated in the above quotation in these words: "that on

said date the said Willie King was a person addicted to the habitual use of morphine, heroin and cocaine, and known by the defendant to be so addicted; that on said date the said Willie King did not require the administration of either morphine, heroin or cocaine by reason of any disease or condition other than such addiction, and the defendant did not dispense said drugs or any of them to said Willie King for the treating of any disease or condition other than said addiction". Let's note that in the above quotation of the most extreme view that can be found the Court says: "It may be true that a physician's method of treatment of drug addiction is a question to be determined by the physician himself and not by a jury," which is followed by the qualification to the effect that it can only be true so long as the physician proceeds with the honest endeavor to effect a cure, in which we might, if necessary also fully concur, since there is not here to be found even the semblance of an allegation negating the honest endeavor which the law imputes.

The view in the Hoyt case above noticed goes beyond that expressed in other Federal Courts in cases under the Harrison Act. In the Barbot case cited and quoted in the brief we find language clearly supporting our contention that the indictment is fatally defective in its failure to specify the purpose of the defendant in administering the drugs, whether to effect a cure or afford temporary relief. In the Barbot, as in the Hoyt case, the professional character of the defendant was flagrantly prostituted and he became a wholesale and retail dealer in the drugs mentioned in the statute, dispensing them in quantities large and small, to whomsoever asked for them and paid the

price. But in the opinion is found language evidencing a disagreement with the view that the drug can never be prescribed merely to afford temporary relief. The Court said, (at p. 921, 273 Fed. R.), "A careful review of the decisions as they exist at the present time make clear the fact, that, where a physician is charged with unlawfully selling or prescribing drugs under the Harrison Act, the case turns largely upon his good faith in prescribing drugs to his regular patients for maladies requiring the administration of the drug, or whether he prescribed for persons seeking his professional aid merely to procure the drug. *In the latter case the physician might, perhaps, in a single instance, afford temporary relief for one whose condition demanded immediate treatment.*" We have underscored certain significant and relevant words.

It was not necessary that the said Willie King should have been under the direct control of the defendant to constitute said King defendant's "patient", within the meaning of the statute, as the term is there used.

If said King applied to the defendant for professional treatment, the former thereby became the latter's patient. Such is the purport of the opinion in *Jin Fuey Moy vs. U. S.* (254 U. S. 189) per Mr. Justice Pitney, as follows: "Manifestly the phrase 'to the patient' and 'in the course of his professional practice only' are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the Act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to

the appetite or satisfy the craving of one addicted to the use of the drug. A 'prescription' issued for either of the latter purposes protects neither the physician who issues it nor the dealer who knowingly accepts and fills it." We may safely accept this as a correct statement of the rule or principle which should govern the present and all other such cases. There is nothing in the indictment which has the slightest tendency to align the defendant in an attitude in conflict with the rule so stated by this honorable Court.

The abandonment of all Assignments of Error, except the 5th, does not of course preclude the defendant from urging defects in the indictment other than that embodied in the preceding objections.

Therefore in order to save any points for the Court's consideration, which we may have inadvertently overlooked, we reiterate the first ground of demurrer to the indictment in these words: "That the facts alleged in said indictment do not constitute a crime."

Also, since Judge Shepard, in sustaining the demurrer, expressed concurrence with Judge Knox of the same Court, who sustained a like demurrer in a similar case, in *U. S. vs. Balint and Randazzo*, (June 28th, 1921) on the same ground embodied in the defendant's fourth ground of demurrer in this case, (R. 4, 5) we here also rely on said fourth ground, which, is in these words: *Fourth: That the facts alleged in said indictment, do not constitute a crime, because it is not therein alleged that the defendant dispensed said drugs wilfully, and there is no allegation that the defendant in dispensing said drugs acted with criminal intent, and no allegation*

from which it can be inferred that defendant acted wilfully or with criminal intent.

We also append the opinion of Judge Knox in said Balint and Randazzo case as follows:

“Section 2 of the so-called Harrison Narcotic Law provides that ‘It shall be unlawful for any person to sell, barter, exchange or give away’ any compound, manufacture or derivative of opium or of cocoa leaves’ except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue.

In an indictment of two counts, each of which follows the words of the statute, the defendants are charged with doing the prohibited acts. To this indictment both defendants have demurred upon the ground that neither count thereof contains any allegation of scienter upon the part of the defendants.

The Government contends that such allegation is unnecessary by reason of the fact that the statute makes no provision that the crimes denounced thereby should be knowingly and wilfully committed, and cites in support of its position the line of cases of which *U. S. vs. Malone*, 9 Fed. 897 (unlawful distilling); *Shevlin-Carpenter Co. vs. State of Minnesota*, 218 U. S. 57 (The unlawful cutting of timber); and *Armour Packing Co. vs. U. S.*, 209 U. S. 56 (involving the departure from filed and published interstate commerce tariffs), are familiar examples.

In the last-mentioned case it was said ‘While intent is in a certain sense essential to the commission of a crime, and in some cases it is neces-

sary to show moral turpitude in order to make out a crime, there is a class of cases * * * where purposely doing a thing prohibited by statute may amount to an offense, although the act does not involve turpitude or moral wrong.'

But isn't it true that such violations of the Harrison Law, as are most frequently prosecuted involve turpitude and moral wrong?

In *U. S. vs. Jin Fuey Moy*, 241 U. S. 394, 402, the Supreme Court, while sustaining the Harrison Law upon the ground that it was a revenue measure, nevertheless said that 'It may be assumed that the statute has a moral end as well as revenue in view * * *', and, considering the severity of the punishment which may be imposed upon persons guilty of violating the provisions of the statute, there is ample support for such statement.

Indeed, by way of argument that scienter is not a necessary ingredient of the crime charged against the defendants, the Government says that the failure of Congress to use the words 'wilfully and knowingly' in defining the offense complained of indicates that the act 'is both a revenue measure and remedial, having for its purpose not only the raising of revenue and the prevention of fraud, in that direction, but also the moral end of preventing the dissemination of cocaine and morphine drugs of great potential danger to the public when improperly used, and that those who deal in such drugs do so at their peril * * *'.

It thus seems to me that an unlawful sale of narcotics is of such nature as properly to be regarded as *malum in se*, and to thus necessitate, in an indictment therefor, words of scienter.

For all that is said against these defendants, they may not purposely have sold the narcotics; and such must have been their purpose even under the Armour Packing Co. case (*supra*).

For these reasons I hold the demurrer well taken, and the same will be sustained."

WHEREFORE, we respectfully ask that the Writ of Error be dismissed.

BASCH & KULKIN,
Attorneys for Defendant in Error,
O. & P. O. Address,
1265 Broadway,
Borough of Manhattan,
New York City.

THOMAS C. SPELLING,
Of Counsel,
165 Broadway,
Borough of Manhattan,
New York City.